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The Principle of Good Faith in Life Insurance Contract: A Comparative Study of Indonesia and The UK

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Abstract: This study aimed to analyze the principle of good faith in life insurance contract between Indonesia and The UK. The result showed that Indonesia termed good faith as "te goede trouw" or "good faith", and The UK., termed it as "utmost good faith". Indonesia initially put that good faith upon the insured, however, as Act Number 40, 2014 on insurance had been enacted, the responsibility of the good faith belonged to the agency and the insurer as well. This was different from The UK., in which from the beginning had set it under their regulation called Marine Insurance Act 1906, that the responsibility of the good faith must be put upon both the insured and the insurer.

Key words: life insurance contract, good faith, Comparative, Insurer, Insured.

INTRODUCTION

The number of insured over years had been increasing, which impacted on the increase of insurance claim dispute. This could be seen from the data of an organization of Indonesia insurance mediation that between 2006 and 2015, the claim dispute had reached 476 cases containing 245 cases for life insurance, 4 cases for social insurance, and 227 cases for general insurance (BMAI, 2017). The claim dispute of life insurance was due to a kind of legal action between the insured and the insurer regarding to the policy contract. Some problems arose included: the difficulty of claiming the policy since the insured did lapse, Life Insurance Application Form was filled by the insurance agent, and the insured was considered bad in their faith dealing with Life Insurance Application Form by either providing incorrect information (misrepretation) or covering up some material facts the insured actually knew (Huda, 2016).

Good faith in life insurance contract required the insured to carefully and clearly disclose the material facts related to the object insured (Merkin, 2007). Any information the insurer needed to know had to be clearly and completely informed by the insured in regard to the risk the insurer would indemnify (Dover, 1975). Life insurance contract was based on the principle of uberrimae fidei or utmost good faith. In Rozanes versus Bowen case, Scruttuo suggested, "as the underwriter knows everything, it is the duty of the assured…, to make a full disclosure to the underwriter without being asked of all the material circumstance" (Wardhana: 2009).

Though good faith had been generally set in article 1338, paragraph 3 *Burgelijke wet Boek*, it was still necessary to give particular emphasis on life insurance contracts as set in article 251 *Wet Boek van Kophandel* mentioned:

> "Every incorrect of false notice, or every concealment of facts know by the insured party, even tough made in good faith, the nature of which is such that the agreement concerned would not have been made, or would not have been made under the same conditions if the insuring party learnt the factual situation of all these matters, shall render the insurance concerned void."

Carefully investigating article 251 *Wet Boek van Kophandel*, it showed that the arcticle seemed too-pro on the insurer by either protecting them or discharging any improper risks assigned to them, hence, there was no consideration dealing with whether or not the insured had good faith. Article 251 *Wet Boek van Kophandel* unilaterally obligated the insured to diclose any material circumstance precisely, whereas, the insurer was protected from any violation of the principle of good faith derived from the insured. This could be seen from the last sencentes mentioned on the article: "…shall render the insurance concerned void."

The clause of article 251 *Wet Boek van Kophandel* was completely different from the enactment of article 17 Marine Insurance Act 1906 in The UK., containing purport on reciprocal duties of good faith, mentioning: "a contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party (Hodges, 2004).

LIFE INSURANCE CONTRACT

Book 3 of *Burgerlijke wet Boek* article 1774 defined aleatory contract *(kans-overeenkomst)* as actions which results, on profit for all or partial parties, depended to evenement/uncertainty . Such chancy agreement included insurance, gambling, wager, and a kind of chancy agreement which depended on particular evenement. Article 1774 *Burgerlijke wet Boek* categorized insurance into chancy agreement. This was due to the fact that such contract contained the notion of "possibility." The obligation of the insurer to indemnify the insured's loss depended on the presence of the uncertainty/evenement. When an uncertain evenement happened, the insured would be suffered from loss, thus, it was a must for the insurer to indemnify the loss. However, when it did not happen, the ensurer had no obligation to indemnify anything.

H. M. N. Purwosutjipto suggested that the categorizing insurance into gambling and wager was considered inappropriate. This was because: the relationship between the likelihood of ganing profit/loss and the uncertain evenement could still be measured and expected, indicating that if the likelihood of such evenement was close or the likelihood of being loss was close, the insurer could reject the insurance or even increase the premium. However, in gambling or wager, the relationship between those two notions could not be initially measured or expected. Profit and loss completely depended on an individual's fate who did gambling or wager. Thus, it might be inappropriate to perceive insurance as aqual to gambling and wager. In fact, it was better to exclude insurance contract from any chancy agreement and it should be specifically put into *Wet Boek van Kophandel*. Such attempt had been addressed as the establishment of Chapter IX and X in Book I and Chapter IX and X in Book II *Wet Boek van Kophandel* (Purwosutjipto, 1990).

The definition of insurance based on positif law in Indonesia was formaly limited in article 246 *Wet Boek van Kophandel*: insurance was a contract through which an insurer bind him/herself toward the insured by receiving a premium in order to indemnify any loss the insured suffered from due to particular uncertain evenement. Article 1 paragraph 1, Act. 40, 2014 on insurance had defined insurance as a contract of two parties, insurance company and policyholder, through which the company would earned premium in return for: providing indemnification of any loss or legal responsibility toward the third party the insured suffered from due to particular uncertain evenement; or providing disbursement based on the death or the life of the insured in which the amount of the benefit had been predetermined and/or based on fund management.

Similarly, E. R. Hardy Ivamy (1979) stated, "a contract of insurance in the widest sense of term may be defined as a contract whereby one person, called the "Insurer", undertatakes, in return for the agreed consideration, called the "premium," to pay to another person, called the"Assured," a sum money, or its equivalent, on the happening of a specified event." Merkin (2007) defined insurance as "a rare species of contract where both parties, the insured and the insurer, are under a mutual duty of utmost good faith." Wei Song argued that England, previously, applied Insurance Contract Act 1906, in which the insurance contract was set under the principles of general law. Insurance contract, according to Romer LJ, was revealed in a case of Seaton versus Heath, in which the judge defined insurance contract as: "contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or not the same means." Turner illustrated insurance contract as "a contract by which one party, called the insurer, in consideration of a sum of money called the premium undertakes to pay to another person called the insured, a sum of money, or its equivalent, on the happening of a specified event. The person undertaking the risk is called the insurer and the party who is indemnified is called the insured." Insurance contract had also been referred to particular characteristicss. Sir Robert Megarry V.C, in a case of Medical Defence Union Ltd v. Department of Trade, gave classical definition dealing with insurance contract: first, the contract of insurance must provide that the assured would become entitled to something on the occurrence of some event.... second, the event must be one which involves some element of uncertainly.... third, the assured must have an insurable interest in the subject matter of the contract..."

Overall, it could be concluded that life insurance contract was a contract of an insurance company, called as the insurer, and the policyholder, called as the insured, through which the insurer indemnified any loss risks the insured suffered from by giving grant/benefit value, and the insured obligated to pay premium, with human body as the object (Huda, 2016).

THE NATURE OF GOOD FAITH IN LIFE INSURANCE

Good faith was, in general, set under article 1338, paragraph (3) *Burgelijke Wet Boek*. However, for life insurance, good faith was based on article 251 *Wetboek van Kophandel* stating: "Every incorrect of false notice, or every concealment of facts know by the insured party, even tough made in good faith, the nature of which is such that the agreement

concerned would not have been made, or would not have been made under the same conditions if the insuring party learnt the factual situation of all these matters, shall render the insurance concerned void." (Engelbrecht, 1989).

Article 251 *Wetboek van Kophandel* set the good faith of pre-contract with subjective standard. Good faith of pre-contract referred to an obligation to inform or explain (*mededelingsplicht*) and investigate (*onderzoekplicht*) any material circumstance related to several terms that parties woud negotiate. The subjective standard was regarded to mental attitudes of the parties when establishing the life insurance contract. The principles contained in article 251 *Wetboek van Kophandel* was *uberrima fides* atau *uberrima fidae*. It derived from Latin which referred to " a phrase used to express the perfect good faith, concealing nothing, with which a contract must be made; for example in the case of insurance, the insured must observe the most perfect good faith towards the insurer" (Robinson et.al, 1998).

Uli Foerstl argued that the word *fides* was derived from the name of the Roman goddess fides, the deification of good faith and honesty, the oath, and that one must keep one's word." The key construct of *bona fides* was *fides*. This *fides* wa developed as the standard of contract procedures, known as *exceptio doli* (Foerstl, 2005) The principle of good faith under Roman Law was then extended into *Civil Law* and *Common Law* systems. It evolved in Dutch as well, known as *"te goede trouw"*, and The UK., as *"good faith"*(Eijken, 2001). Good faith of life insurance pre-contract in Dutch was set under article 7.17.1.928 paragraph 1 *Nieuwe Burgerlijke Wetboek* through which the insured was obligated to disclose material facts as mentioned: "Prior to concluding the contract the policyholder must disclose to the insurer all facts of which he is or ought to be aware and on which, as he knows or ought to understand, the decision of the insurer whether, and if so, on what terms, the latter is willing to conclude the insurance will or may depend" The article emphasized that prior to dealing the contract, the insured had to reveal all facts he/she (should) knew toward the insurer, as he/she realized that all the facts he/she informed would effect on the insurer's decision whether or not the insurance might be accepted, and if so, on what terms. Furthermore, article 7.17.1.928 paragraph 4 *Nieuwe Burgerlijke Wetboek* on facts disclosure the insurer had to know mentioned that: "The disclosure obligation does not extend to facts of which the insurer is already or ought to be aware, or to facts which would not have resulted in a less favourable decision for the policyholder. However, a policyholder or a third person referred to in paragraph 2 or paragraph 3, who has given an incorrect or incomplete answer to

a specific question on the matter may not claim that the insurer was already or ought to have been aware of specific facts. The disclosure obligation shall also not extend to facts for which no medical examination may be performed and on which no questions may be raised pursuant to Articles 4 to 6, inclusive, of the Wet op de medische keuringen (Medical Examinations Act) in the instances mentioned therein. Article 7.17.1.928 paragraph 6 *Nieuwe Burgerlijke Wetboek* on life insurance contract derived from questionnaire proposed by the insured was set as follow: "When the insurance is concluded on the basis of a questionnaire drafted by the insurer, the insurer may not rely on the fact that questions were not answered or that facts in respect of which no question was raised were not disclosed or that the answer to a question couched in general terms was incomplete, unless there was intent to mislead the insurer."

The essence of good faith of pre-contract in Dutch jurisprudence was as follows: case of *Baris v. Riezenkamp*, HR. 15th November 1957, NJ 1958, 67, the verdict decided that all negotiating parties should have good faith as their base. As the result, one party had to consider other's legal behalf within the contract. *Hoge Raad*, then, successfully formulated or established the principle of punctilio in composing contract (*contractuele zorgvuldigheid, duty of care*), which included accuracy for buyers to inversitgate and quest (*onderzoeksplicht*) for material facts related to the subject of the contract.

The food faith of life insurance pre-contract was apparent on a case of *D. Tilkemena v. De Bataafsche Verzekering Maatschappij N.V.*, 8th June 1962 NJ. 1962, 366 (laterly known as *Arrest Tilkemena's Duim*). In this case, Tilkemena took insurance on *De Bataafsche Verzekeringmaatschppij N.V.* When asking for the insurance to close, Tilkemena did not tell that he had frequently been sentenced for many crimes of civil law he did. However, the insurer neither asked the insured's criminal history, and the insured did not know that such facts had to be disclosed, hence, it could not be assumed that the insured ought to realized the importance of disclosing those facts toward the insurer. If this is the case, article 251 *Wetboek van Kophandel* could not be applied to reject the claim. *Hoge Raad* interpreted article 251' *Wetboek van Kophandel* by stating that a contract was legally rejecte if the insured covered up facts (*verzwijging*), and it could only be rejected by the judge due to the insurer's suit since the insured did not disclose the real facts (*verkeerde of ontwaarachtige opgave*). Following the *Arrest*, it was suggested that disclosing improper facts did not automatically make the insurance rejected, as mentioned in article 251 *Wetboek van Kophandel*, however, it could be rejected and should be proposed to the court. It could be assumed that good faith of

the insured needed to be considered by Arrest Tilkemena as mentioned in *Nieuwe Burgerlijke Wetboek*, article 7.17.1.928 paragraph 1 and 6.

Arrest Hoge Raad on 19th May 1978 NJ. 607 on a case of an X in Belgium and *De naamloze vennootschaap Goudse Verzekering Maatschappij N.V* in Amsterdam. It posited that the importance of facts disclosure from the insured as set under article 251 *Wetboek van Kphandel* must be considered based on a prudent insurer. This could also assumed that the insurer did not seek for the importance of intended facts. In this case, the insured had to be honest in diclosing facts he/she knew dealing with the insured object (Wery et.al., 2010). Therefore, it could be concluded that the construct of article 251 *Wetboek van Kophandel* on life insurance contract by *Hoge Raad* was viewed with equal obligation for the insurer to investigate (*mededelingsplicht*) material facts such as the insured's medical history mentioned in the process of the contract negotiation. As the result, it was a must for both the insurer and the insured to have accuracy (*contractuele zorgvuldigheid*) and dignity in composing contract (*contractuele rechtwaardigheid*).

Lord Mansfield emphasized the importance of the principe of *utmost good faith* in insurance contract established in The UK. He stated, "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstances does not exist, and to induce him to estimate the risque as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void… The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary …."

Susan Hodges suggested that the principle of utmost good faith could be applied to all policies whatever the risk or the subject-matter insured (Hodges, 2004). The term "good faith" was translated into good willing. Therefore, utmost good faith referred to best good willing and the principle of utmost good faith mentioned that prior to concluding a contract, each party had an obligation to completely disclose all facts or information which could affect another party's decision, whether accepting or rejecting the contract, whether or not such facts was asked.

However, particularly for life insurance in The UK., the principle of utmost good faith was not the only good faith as mentioned in article 251 *Wetboek van Kophandel*, though the term was similar between good faith and *te goede trouw*. The principle of utmost good faith tended to concern on the obligation the parties must complete prior to concluding the contract, not in order to implement the concluded contract as mentioned in article 1338 paragraph 3 Burgerlijke wet Boek. The term "good faith" was applied for commercial contract, and the term "utmost good faith" was for life insurance. In life insurance, the prospective insured must have more than just a good faith. The term "utmost good faith" in The UK., was derived from the word "utmost" as the emphasis of "good faith" which became a part of the basic concept. However, Susan Hodger suggested that a high degree of good faith was required to satisfy.

This indicated that good faith referred to "different things to different peoples in different moods at different times and in difference places.", however, from ontological view, it was defined as "fairness, fair conduct, reasonable standarts of air dealing, decency, reasonableness, decent behavior, a common ethical sense, a spirit of a solidarity, community standarts of fairness, decency and reasonableness"(Lucke, 1987). Scrutton L.J in a case of *Rozanes v. Bowen* 1928, posited, "as the underwriter knows nothing and the man who comes to him to ask him to insure knows everthing, it is the duty of the assured...to make a full disclosure to the under writer without being asked of all the material circumstances."

The principle of "utmost good faith" had parties act in accordance to the common good faith. The obligation was focused on the term "utmost" as the standard of good faith which represented honesty. The obligation of "utmost good faith" had to be distincted from "food faith" which required honesty in disclosing information, did not require the parties to reveal all facts they knew. If "good faith" was considered as an obligation to disclose real information, the term "utmost good faith" obligated one of the parties to willingly disclose all fundamental facts to another party, even when she/he was not asked for doing so. Necessary information disclosed by parties was useful to determine whether or not the contract was fair and based on common sense and reasonable questions, as what commonly mentioned in other commercial contract. Specifically, all facts and personal information the insured knew was necessary to measure the risk dealing with the life insurance contract.

In a life insurance contract, the insured was assumed to be aware of the insured object (i.e., medical history) since he/she had to carefully and completely disclose all material facts

related to the insured object, whether it was required or not, such as past-illness, smoking habits, and even extreme sport habits (e.g., mount climbing). All material facts disclosed would be appraised by the insurer, which might impact on the insurer's decision, whether or not accepting the risk insured. Hence, it was a must for the prospective insured to be appraised as the fulfillment of underwriting standard. The underwriter/insurer would whether accept or reject the contract by establishing a higher premium (Chumaida, 2013).

Therefore, good faith referred to a willing to always honestly answer each question asked by the insurer, and utmost emphasized on the insured's initiative to disclose all facts the insurer asked. The insured realized that those facts would increase the risk of insured object. Overall, it could be concluded that the keyword of utmost good faith referred to honesty or good willing, in the part of the insured to disclose all material facts which seemed impact on the insurer's decision. Generally, the principle of good faith acted prior to and as long as the insurance contract was considered prevailed. Jurisdiction had posited that "utmost good faith" was an appropriate standard to be applied for life insurance contract. Basically, the relationship between the insurer and the insured was equal in terms of obligation for "utmost good faith" in life insurance.

Kapler A. Marpaung suggested that misconception of implementing such principle frequently happened in business of life insurance. Utmost good faith seemed to be the insured's obligation, and the insurer had no responsibility to have good faith toward the insured (Wardhana, 2009: 36). Lord Jauncey, House of Lord in a case of *Banque Financiere v. Skandia (UK) Insurance Co. Ltd* also concluded that the obligation to have "utmost good fiath" and disclose material facts was equally prevailed for both the insurer and the insured. He asserted that both parties, the insurer and the insured, were obligated to have good faith for each other, as his statement: "The duty of disclosure arises because the facts relevant to the estimation of the risk are most likely to be within the knowledge of the insured and the insurer therefore has to rely upon him to disclose matters material to that risk. The duty extends to the insurer as well as to the insured : Carter v.Boehm. The duty is, however, limited to facts which are material to the risk insured, that is to say facts which would influence a prudent insurer in deciding whether to accept the risk and, if so, upon what terms and a prudent insured in entering into the contract the terms proposed by the insurer. Thus any facts which would increase the risk should be disclosed by the insured and any facts known to the insurer but not the insured, which would reduce the risk, should be disclosed

by the insurer, There is, in general, no obligation to disclose supervening facts which come to the knowledge of either party after conclusion of the contract… Although there have been no reported cases involving the failure or an insurer to disclose material facts to an insured the example given by Lord Mansfield in Carter v.Boehm is of an insure who insured a ship for a voyage knowing that she had already arriver."(Song, 2012). In addition, Derrington dan Ashton argued,"good faith has proved difficult to define, but it has generally come to mean fair dealing in which one party puts the interests of the other at least at the same level of protection as his or her own."

The good faith of life insurance pre-contract was higher in standard than the commercial contract. It was stated that the requirement of good faith in life insurance contract was higher and thighter than commercial contract. First, parties in a life insurance contract were required to willingly and honestly disclose all real material facts to each other, whereas, parties in a commercial contract had no responsibility to disclose anything. Second, any violation of good faith in a life insurance contract could ended with contract dissolution, whereas, violations of good faith in a commercial contract might not result in contract dissolution but merely decided by another party who did not do the violation. Third, in life insurance contract, the insurer could end the contract on which the insured broke the rules within, whereas, in commercial contract, the violation must be causally related to the loss suffered before the violated party could claim their loss. Finally, it concluded that parties, in establishing their contract, applied "utmost good faith" phrase for life insurance contract and "good faith" phrase for commercial contract (Zheng, 2004).

Lord Manfield illustrated good faith as "The governing principle applicable to all contracts and dealing. He introduced that insurance is a contract based upon speculation, involving reliance and confidence, particularly of the insurer upon the assured, but applicable to bot. He stressed that insurer upon the assured, but applicable to both. He stressed that insurance contract demands disclosure of circumstances and if any party fail to disclose, even by mistake, this is fraud. The policy will void because of this fraud."(Ahmad, 2004) It was useful as the base for Lord Mansfield (1766) to decide, in a case of *Carter v. Boehm*, that insurance contract was under the principle of utmost good faith. Furthermore, he mentioned the position of that case as follows: "Background to Carter v Boehm: Carter was the Governor of Fort Marlborough, which was built by the British East India Company in Sumatra, Indonesia. Carter took out an insurance policy with Mr Boehm against the fort

being taken by a foreign enemy. A witness, Captain Tryon, testified that Carter knew that the fort had been built to resist attacks from natives, but not European enemies, and the French were likely to attack. The French did attack, and Boehm refused to fulfill the insurance claim. Carter sued, but failed to have the claim paid."

The case of *Carter v. Boehm* was related to good faith on pre-contract. The very clear manifestation of good faith referred to the obligation of disclosing all material facts. The reasons behind such obligation were found in Lord Mansfield CJ's statement in *Carter v Boehm*. Basically, the insured usually knew about all relevant information related to the insured risk, hence, it was used as a basis for the insurer to indemnify the risk (Manning, 2010). It concluded that the essence of good faith in life insurance pre-contract had subjective standard which used honesty as the basis to carefully and clearly disclose all the material facts related to the insured object. Parties in that contract were required to have accuracy in investigating or examining the material facts related to the insured object, since it came to the phase of negotiating up to implementing the contract. Therefore, for the purpose of good faith in pre-contract, each of the parties must have accuracy (*contractuele zorgvuldigheid*) and dignity (*contractuele rechtwaardigheid*). Therefore, having negotiation in a life insurance contract should be embedded with good faith as well, instead of its proportionality, in order to reach the real essence of equity for all parties.

CONCLUSION

Insurance referred to a contract between the insured and the insurer dealing with risk assignment. The rules of good faith in Indonesia life insurance was under the stipulation of article 251 *Wetboek van Kophandel*, while England used article 17 Marine Insurance Act 1906. Good faith in Indonesia was termed as "te goede trouw", while The UK., used a term "utmost good faith." Good faith in Indonesia required the insured party to disclose or explain (*mededelingsplicht*) and investigate (*onderzoekplicht*) all the material facts related to the insured object, while The UK., required both the insured and insurer parties to have equal reciprocity duty in terms of willingly providing all information needed which could affect the insurer's decision to whether or not deal the contract. Finally, the specific stipulation of good faith in life insurance for the insurer was set under the article 31, paragraph 2, act Number 40, 2014 on insurance requiring the insurer to provide real information, neither fake nor

misleading dealing with the risk, benefits, obligations and charges in regard to the insurance product offered.

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